

AMENDED IN SENATE APRIL 7, 2005

SENATE BILL

No. 390

Introduced by Senator Bowen

February 17, 2005

An act to ~~add Part 6.5 (commencing with Section 249.50) to Division 2 amend Section 11604~~ of the Probate Code, relating to probate agreements.

LEGISLATIVE COUNSEL'S DIGEST

SB 390, as amended, Bowen. ~~Probate agreements; assignments;~~ cash advances.

Existing law provides for the regulation of ~~viatical settlements and the transfer of structured settlement payment rights~~ *the distribution of an estate*.

This bill would similarly regulate ~~probate agreements, which would be defined as an agreement whereby a beneficiary transfers his or her interest, or future interest, in an estate or trust in exchange for compensation, as specified. The bill would provide for certain disclosure and notice requirements with regard to the price paid for, and the actual value of, the interest or future interest, and would require court approval of those agreements, as specified. The bill would further authorize the Attorney General to review any probate agreement, and would require a buyer thereof to provide certain disclosures to the Attorney General~~ *the assignment of a beneficiary's entire or partial interest in an estate in consideration for a cash advance, as specified. The bill would require the agreement to be filed with the court, would require specified disclosures with regard to costs and fees, and would prohibit an assignment agreement from containing certain provisions, including, but not limited to, an acceleration or binding arbitration clause.*

Because a violation of ~~these~~ *those* provisions would be a misdemeanor, ~~the~~ *this* bill would impose a state-mandated local program by expanding the scope of a crime.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Part 6.5 (commencing with Section 249.50) is~~
2 ~~added to Division 2 of the Probate Code, to read:~~

3 ~~SECTION 1. Section 11604 of the Probate Code is amended~~
4 ~~to read:~~

5 11604. (a) This section applies where distribution is to be
6 made to any of the following persons:

7 (1) The transferee *or assignee* of a beneficiary.

8 (2) Any person other than a beneficiary under an agreement,
9 request, or instructions of a beneficiary or the attorney in fact of
10 a beneficiary.

11 (b) *(1) A beneficiary's entire or partial interest in the estate*
12 *may be assigned by written agreement in consideration for a*
13 *cash advance, only if the following conditions are met:*

14 *(A) The complete assignment agreement is filed with the court.*

15 *(B) The complete assignment agreement is provided to the*
16 *personal representative or the personal representative's attorney*
17 *of record.*

18 *(C) The stated consideration was, in fact, provided to the*
19 *beneficiary.*

20 *(D) The assignment is nonrecourse to the beneficiary in the*
21 *event that there are not sufficient assets from the beneficiary's*
22 *interest in the estate to cover the full value of the assignment.*

23 *(2) In addition to paragraph (1), in consideration of a cash*
24 *advance the following items shall be disclosed, with reasonable*
25 *certainty, to the beneficiary at the time the assignment was*
26 *executed:*

1 (A) The amount of the consideration to be paid to the
2 beneficiary.

3 (B) The amount of the assignment.

4 (C) If applicable, any reduction in the amount of the
5 assignment, if the estate distributes within a stated early payoff
6 rebate timeframe.

7 (D) The amount of any costs or fees to be charged to the
8 beneficiary, such as transaction or processing fees, document
9 retrieval costs, credit report costs, title search costs, due
10 diligence fees, filing fees, bank or electronic transfer costs, or
11 any other fees or costs to be charged to the beneficiary.

12 (3) Other than those charges referred to in subparagraph (C)
13 of paragraph (2), no additional charges, such as interest, fees, or
14 costs, shall be added to the amount of the assignment.

15 (4) The assignment shall be written and available in the same
16 language principally used in any oral discussion or negotiation
17 leading to execution of the agreement and shall be in at least
18 10-point type.

19 (5) Under no circumstance shall an assignment agreement
20 include any of the following:

21 (A) A hold harmless clause.

22 (B) A confession of judgment clause.

23 (C) A power of attorney conferring general powers to the
24 assignee to represent the beneficiary's entire interest in the
25 decedent's estate.

26 (D) Any assignment or other compensation for services, except
27 for the portion of the estate to be assigned under the agreement.

28 (E) Any acceleration provision.

29 (F) A binding arbitration clause.

30 (c) The court on its own motion, or on motion of the personal
31 representative or other interested person or of the public
32 administrator, may inquire into the circumstances surrounding
33 the execution of, and the consideration for, the transfer,
34 agreement, request, or instructions, and the amount of any fees,
35 charges, or consideration paid or agreed to be paid by the
36 beneficiary.

37 ~~(e)~~

38 (d) The court may refuse to order distribution, or may order
39 distribution on any terms that the court deems just and equitable,
40 if the court finds either of the following:

(1) The fees, charges, or consideration paid or agreed to be paid by a beneficiary are grossly unreasonable.

(2) The transfer, agreement, request, or instructions were obtained by duress, fraud, or undue influence.

~~(d)~~

(e) Notice of the hearing on the motion shall be served on the beneficiary and on the persons described in subdivision (a) at least 15 days before the hearing in the manner provided in Section 415.10 or 415.30 of the Code of Civil Procedure.

(f) *A violation of any condition set forth in subdivision (b) is a misdemeanor.*

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

~~PART 6.5. PROBATE AGREEMENTS~~

~~249.50. For purposes of this part:~~

~~(a) "Beneficiary" has the same meaning as defined in Section 24, and includes, but is not limited to, an heir, a devisee, a person who has any present or future interest, vested or contingent, in a trust, and any person entitled to enforce a trust.~~

~~(b) "Buyer" means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.~~

~~(c) "Interested parties" means, with respect to a probate agreement, the beneficiary, any other beneficiary of that estate or trust, and the Attorney General.~~

~~(d) "Probate agreement" means an agreement whereby a beneficiary transfers his or her interest, or future interest, in the intestate or testate estate of a decedent, trust, or charitable trust, or in any other estate or instrument described in this code, to a buyer in exchange for compensation, monetary or otherwise.~~

~~(e) "Transfer" means any sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made for consideration.~~

1 ~~249.51. A probate agreement entered into by a beneficiary~~
2 ~~domiciled in this state shall be void and unenforceable, unless all~~
3 ~~of the following conditions are met:~~

4 ~~(a) Ten or more days prior to the effective date of the probate~~
5 ~~agreement, the buyer provides the beneficiary with a separate~~
6 ~~written disclosure statement, in at least 14-point boldface type,~~
7 ~~disclosing all of the following:~~

8 ~~(1) The interest to be transferred by the beneficiary to the~~
9 ~~buyer.~~

10 ~~(2) The effective date of that transfer.~~

11 ~~(3) The amount to be paid to the beneficiary by the buyer.~~

12 ~~(4) The actual and present value of the interest to be~~
13 ~~transferred.~~

14 ~~(5) The effective difference between paragraphs (3) and (4),~~
15 ~~which shall be disclosed in the following statement:~~

16 ~~“THE PROBATE PROCESS NORMALLY TAKES SIX TO~~
17 ~~18 MONTHS. BY SELLING US YOUR INTEREST IN THE~~
18 ~~ESTATE OR TRUST OF _____, YOU WILL BE LOSING~~
19 ~~\$____, WHICH IS THE EQUIVALENT OF AN ANNUAL~~
20 ~~PERCENTAGE RATE (APR) OF __%, FOR THE BENEFIT~~
21 ~~OF RECEIVING A LUMP-SUM ADVANCE NOW. THE APR~~
22 ~~IS CALCULATED BASED ON A 12-MONTH PROBATE~~
23 ~~PROCESS.”~~

24 ~~(6) A statement that the beneficiary should obtain independent~~
25 ~~professional advice regarding any federal and state income tax~~
26 ~~consequences arising from the proposed transfer, and that the~~
27 ~~buyer may not refer the beneficiary to any specific adviser for~~
28 ~~that purpose.~~

29 ~~(7) A statement of the beneficiary’s irrevocable and~~
30 ~~nonwaivable right of rescission pursuant to Section 249.54.~~

31 ~~(8) The following statement in capital letters: “IF YOU~~
32 ~~BELIEVE YOU WERE TREATED UNFAIRLY OR WERE~~
33 ~~MISLED AS TO THE NATURE OF THE OBLIGATIONS~~
34 ~~YOU ASSUMED UPON ENTERING INTO THIS~~
35 ~~AGREEMENT, YOU SHOULD REPORT THOSE~~
36 ~~CIRCUMSTANCES TO YOUR LOCAL DISTRICT~~
37 ~~ATTORNEY OR THE OFFICE OF THE ATTORNEY~~
38 ~~GENERAL.”~~

39 ~~(b) (1) The probate agreement is approved in advance in a~~
40 ~~final court order based on express findings by the court that:~~

1 ~~(A) The transfer is in the best interest of the beneficiary.~~

2 ~~(B) The beneficiary has been advised in writing by the buyer~~
3 ~~to seek independent professional advice regarding the transfer~~
4 ~~and has either received that advice or knowingly waived that~~
5 ~~advice in writing.~~

6 ~~(C) The buyer has provided the beneficiary with a disclosure~~
7 ~~statement consistent with subdivision (a) and the probate~~
8 ~~agreement complies with Section 249.53.~~

9 ~~(D) The transfer does not contravene any applicable statute or~~
10 ~~the order of any court or other government authority.~~

11 ~~(2) The application under paragraph (1) for approval of~~
12 ~~transfer shall be made by the buyer and brought in the county in~~
13 ~~which the beneficiary resides.~~

14 ~~(3) Not less than 20 days prior to the scheduled hearing on any~~
15 ~~application for approval of a transfer under this part, the buyer~~
16 ~~shall file with the court and serve on all interested parties a notice~~
17 ~~of the proposed transfer, the application for its authorization, the~~
18 ~~probate agreement, the disclosure statement described in~~
19 ~~subdivision (a), notification that any interested party is entitled to~~
20 ~~respond to the buyer's application, either in person or by counsel,~~
21 ~~and notification of the time and place of the hearing and the~~
22 ~~manner and time by which written responses must be filed, which~~
23 ~~shall not be less than 15 days after service of the notice, in order~~
24 ~~to be considered by the court. The Attorney General may, but is~~
25 ~~not required to, review any probate agreement in order to ensure~~
26 ~~that the transfer meets the requirements of this part.~~

27 ~~(4) All court costs and filing fees shall be paid by the buyer.~~

28 ~~(5) No later than the time of filing of the petition for court~~
29 ~~approval, the buyer shall advise the beneficiary of the~~
30 ~~beneficiary's right to seek counsel in connection with the buyer's~~
31 ~~petition for court approval of the probate agreement, and shall~~
32 ~~further advise the beneficiary that if the beneficiary retains~~
33 ~~counsel in connection with that petition, the buyer shall pay the~~
34 ~~beneficiary's counsel's fees, regardless of whether the probate~~
35 ~~agreement is approved, in an amount not to exceed one thousand~~
36 ~~five hundred dollars (\$1,500).~~

37 ~~249.52. The buyer shall provide the Attorney General, within~~
38 ~~30 days of obtaining the final court approval described in~~
39 ~~subdivision (b) of Section 249.51, all of the following in writing:~~

1 ~~(a) Whether the beneficiary was represented by an attorney~~
2 ~~and the costs paid or owed to that attorney by the buyer and, if~~
3 ~~known, by the beneficiary.~~

4 ~~(b) The county and judicial district where the court approval~~
5 ~~was filed.~~

6 ~~(c) For approved agreements, whether any changes were made~~
7 ~~to the probate agreement.~~

8 ~~(d) For rejected agreements, a general explanation for that~~
9 ~~rejection.~~

10 ~~(e) The total court costs and attorney's fees paid by the buyer~~
11 ~~to obtain court approval.~~

12 ~~(f) The difference between the purchase price under the~~
13 ~~probate agreement and the actual value of the interest transferred,~~
14 ~~as specified in paragraph (5) of subdivision (a) of Section 249.51.~~

15 ~~249.53. (a) A probate agreement shall not include any~~
16 ~~provision described in the paragraphs below. Any inclusion of a~~
17 ~~prohibited provision, with respect to a beneficiary domiciled in~~
18 ~~this state, shall make the probate agreement void and~~
19 ~~unenforceable.~~

20 ~~(1) Any provision that waives the beneficiary's right to sue~~
21 ~~under any law, or in which the beneficiary agrees not to sue, or~~
22 ~~that waives jurisdiction or standing to sue under the agreement.~~

23 ~~(2) Any provision that requires the beneficiary to indemnify~~
24 ~~and hold harmless the buyer, or to pay the buyer's costs of~~
25 ~~defense, in any claim or action brought by the beneficiary or on~~
26 ~~the beneficiary's behalf contesting the sale for any reason.~~

27 ~~(3) Any provision providing that the contract is confidential or~~
28 ~~proprietary, belonging to the buyer.~~

29 ~~(4) Any provision in which the beneficiary stipulates to a~~
30 ~~confession of judgment.~~

31 ~~(5) Any provision requiring the beneficiary to pay the buyer's~~
32 ~~attorney's fees and costs if the purchase agreement is not~~
33 ~~completed.~~

34 ~~(6) Any provision requiring the beneficiary to pay any tax~~
35 ~~liability arising under the federal tax laws, other than the~~
36 ~~beneficiary's own tax liability, if any, that results from the~~
37 ~~transfer.~~

38 ~~(7) Any forum selection provision providing for jurisdiction to~~
39 ~~be in a court outside of California for any action arising under the~~
40 ~~contract.~~

~~(8) Any choice-of-law provision that provides for controlling law to be other than California law in any action arising under the contract.~~

~~(9) Any provision that creates a “buyer’s first right of refusal,” as defined in subdivision (a) of Section 10134 of the Insurance Code, to purchase any remaining interest that the beneficiary may desire to transfer in the future.~~

~~(b) The provisions in this section may not be waived by agreement of the parties.~~

~~249.54. At any time prior to the date on which the probate agreement first becomes binding upon both parties, the beneficiary may cancel that agreement without cost or further obligation, by providing written notice of cancellation to the buyer.~~

~~249.55. Any notice required by this part shall be deemed to have been sent and received if addressed to the recipient’s last known address and deposited, first-class postage prepaid, in the United States mail not less than five calendar days prior to the date on which the notice is required to be provided.~~

~~249.56. This part is only applicable to probate agreements entered into on or after January 1, 2006.~~

~~249.57. (a) A violation of this part is a misdemeanor.~~

~~(b) A violation of this part by a buyer shall constitute an unfair business practice pursuant to Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code, and shall be subject to the penalties and other remedies of that chapter.~~

~~SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.~~